BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
	)	
Promotion of Competitive Networks	)	WT Docket No. 99-217
In Local Telecommunications Markets	)	
	)	

COMMENTS OF COMMONWEALTH EDISON COMPANY AND DUKE ENERGY CORPORATION

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Dated: January 22, 2001

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Commonwealth Edison Company and Duke Energy Corporation (collectively, the "Electric Utilities"), by and through counsel and pursuant to Section 1.415 of the rules and regulations of the Federal Communications Commission ("FCC" or "Commission"), respectfully submit the following Comments regarding the proposed expansion of the definition of so-called "rights-of-way" in multi-tenant environments, in response to the Further Notice of Proposed Rulemaking in the above-captioned docket.[1]

I. STATEMENT OF INTEREST

The Electric Utilities are investor-owned utilities engaged in the generation, transmission, distribution and sale of electric energy. Collectively, their service territories span multiple regions of the United States and together they provide electric service to millions of residential and business customers. The Electric Utilities own electric energy distribution systems that include distribution poles, conduit, ducts and rights-of-way, all of which are used to provide electric power service to their customers. Portions of this infrastructure, particularly distribution poles, are used in part, for wire communications. The Electric Utilities are subject to regulation by the Commission under the Pole Attachments Act, 47 U.S.C. § 224.

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[1] *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets,* WT Docket No. 99-217, FCC 00-366, *Further Notice of Proposed Rulemaking* (rel. Oct. 25, 2000) ("*Further NPRM*").

II. INTRODUCTION

In the *First Report and Order*,[2] the FCC created a new federal definition of "rights-of-way" as used in Section 224. Under the new definition, a "right-of-way" (1) extends inside buildings, and (2) includes, at minimum, a defined pathway that a utility either is actually using or has specifically identified and obtained the right to use in connection with its transmission and distribution network. *First Report and Order* at ¶ 83. In the *Further NPRM*, the Commission seeks comment on whether "right-of-way" should also be read to include space anywhere in a building when a utility has a right of access to that building. *Further NPRM* at ¶¶ 169-179.

III. ARGUMENT

1. The FCC Has No Power To Expand The Common Law Definition Of A Right-Of-Way.

The FCC has already acted beyond the scope of its authority in the *First Report and Order* by creating a new federal definition of "right-of-way" that goes beyond the common law definition of the term.[3] The further expansion of the definition of "right-of-way" proposed in the *Further NPRM* would simply compound this error. It is axiomatic that where Congress uses a term such as "right-of-way" that has a settled meaning under common law, Congress is deemed to have incorporated the established meaning of the term into its statute. As the Supreme Court stated in *Morissette v. United States*, 342 U.S. 246, 263 (1952):

> [W]here Congress borrows terms of art in which are accumulated legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from

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[2] In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets, *First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57,* FCC No. 00-366 (rel. Oct. 25, 2000) ("*First Report and Order*").

[3] See Petition for Reconsideration of Commonwealth Edison Company and Duke Energy Company, submitted in In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets, *First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57,* FCC No. 00-366 (rel. Oct. 25, 2000). The Petition for Reconsideration and the arguments made therein are specifically incorporated in these Comments.

> which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

This "cardinal rule" of statutory construction has been applied by the Supreme Court in an unbroken line of cases spanning two centuries.[4]

The term "right-of-way" as used in Section 224 is a prime example of this rule. The term is of ancient origin. Rights of way appear in the Twelve Tables of Rome. W. Buckland, *The Main Institutions of Roman Private Law* 152 (1931). The term has developed in the rich common law tradition of real property over centuries of use in England and in America.

At common law, a "right-of-way" denotes the right to pass over the land of another, not the right to pass into buildings. We are aware of no authority, and the Commission has cited none, which holds that a "right-of-way" at common law extends into buildings. Accordingly, under the *Morissette* line of cases, the Commission's threshold determination that "rights-of-way" as used in Section 224 extends into buildings is an impermissible construction of the statute.

The notion that a "right-of-way" extends to an *entire* building where a utility has access to defined pathways in that building represents a further unauthorized departure from the common law definition of the term. Assuming, *arguendo*, that a utility's access to defined pathways in a building is properly characterized as a "right-of-way," it is simply nonsensical to conclude that this "right-of-way" extends outside the pathways that have been defined for the

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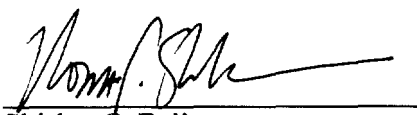
[4] *See, e.g., Beck v. Prupis*, 529 U.S. 494 (2000) (applying *Morissette* in the civil context to determine Congress's intent to compensate one "injured ...by reason of" a "conspiracy"); *Neder v. United States*, 527 U.S. 1, 21-22 (1999); *Salinas v. United States*, 522 U.S. 52 (1997)(interpreting Congress's use of "to conspire" by applying *Morissette's* standard of statutory construction for well settled legal terms); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992); *Taylor v. United States*, 495 U.S. 575, 592 (1990)(identifying the "maxim that a statutory term is generally presumed to have its common law meaning"); *Molzof v. United States*, 502 U.S. 301 (1992)(interpreting the term "punitive damages" in the Federal Tort Claims Act to be "term of art with a widely accepted common law meaning," and utilizing *Morissette's* "cardinal rule of statutory construction" to determine Congressional intent); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 59 (1911) ("Where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense").

utility's use. The scope of the electric company's access inside buildings is defined by the terms of its grant of access,[5] and the placement of electric wiring is heavily regulated under local building codes and the National Electric Code ("NEC"), which establishes safety standards for electric facilities inside buildings. Electric utilities simply do not have the right, however defined, to place their wires outside of the pathways which have been identified for electric wiring. If the utility does not have that right, then even assuming it made sense to talk about a utility having a "right-of-way" in a building (which it does not), such a "right-of-way" would not extend to areas outside the defined pathways the "utility either is actually using or has specifically identified and obtained the right to use."

IV. CONCLUSION

WHEREFORE, for these and such other reasons as may appear just to the Commission, the Electric Utilities respectfully request that the Commission not expand its definition of "right-of-way" in MTEs, and indeed that it vacate its earlier decision to define "rights-of-way" as extending into buildings.

Respectfully submitted,



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[5] The terms and conditions under which an electric utility is granted the right to occupy space in MTEs typically are set forth in service tariffs the utility files with the state public service commission. These service terms set forth how the electric utility will be given building access when the building owner decides to order electric service initiation. The tariff terms then become the binding agreement with the building owner that governs the service provided to a particular building.

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of January, 2001, I caused true and correct copies of the Comments Of Commonwealth Edison Company and Duke Energy Corporation to be served via hand delivery on:

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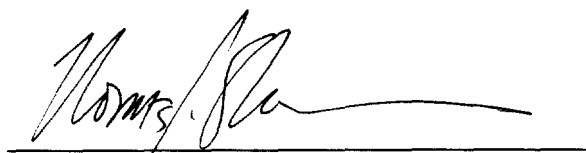

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